98-6322

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ANTONIO TONTON SLACK, Petitioner

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA, Respondents.

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI VOLUME I

Supreme Court, U.S.
FILED
OCT 5 1998
OFFICE OF THE CLERK

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*TIMOTHY P. O'TOOLE
Asst. Federal Public Defender
330 S. Third St., #700
Las Vegas, Nevada 89101
* Counsel for Petitioner

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40 pp

VOLUME I

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U.S. DISTRICT COURT
DISTRICT OF NEVADA
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CLERK, U.S. DISTRICT COURT
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AO 72 (Rev. 8/82) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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98 MAR 31 AM 8:24
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CLERK
BY _____ DEPUTY

ANTONIO A. SLACK,

Plaintiff,

V.

E.K. MCDANIEL, et al, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-N-95-194-DWH**

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

XX Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that respondents' motion to dismiss (#67) is **granted, and this action is dismissed without prejudice.**

March 31, 1998
Date

LANCE S. WILSON
Clerk

Marti Campbell
(By) Deputy Clerk

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CLERK
BY _____ DEPUTY

U.S. DISTRICT COURT
DISTRICT OF NEVADA
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CLERK, U.S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner,	)	Case No. CV-N-95-194-DWH
vs.	)	
E.K. McDANIEL, *et al.*, Respondents.	)	MEMORANDUM DECISION AND ORDER

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons*, CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex.37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct

the jury[1]; (5) he was denied effective assistance of counsel[2]; (6) he was denied effective assistance of appellate counsel[3]; and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four (C), five (B-E), six and seven are unexhausted. Slack was ordered to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

---

[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this rule. Additionally even if Slack could bring a motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, --- U.S. ----, ----, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254 (b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678

F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA)[4]; however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

---

[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, of the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

UNITED STATES DISTRICT JUDGE

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JUL - 9 1998
Federal Public Defender
Las Vegas, Nevada

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL - 7 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ANTONIO TONTON SLACK, Petitioner, vs. E. K. MCDANIEL, Attorney General of the State of Nevada, Respondent.	No. 98-15943 DC# CV-95-194-DWH Nevada (Reno) ORDER

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of probable cause is denied.

mocal/6.29.98/bd

FILED
MAR 23 12 27 PM '90
Loretta Bowman
CLERK

DISTRICT COURT

Clark County, Nevada

THE STATE OF NEVADA, Plaintiff -vs- ANTONIO TONTON SLACK, #0926733 Defendant,	CASE NO. C92060 DEPT. NO. IV JUDGMENT OF CONVICTION (JURY TRIAL)

WHEREAS, on the 8th day of January, 1990, the Defendant ANTONIO TONTON SLACK, entered a plea of not guilty to the crime of MURDER WITH USE OF A DEADLY WEAPON committed on or about the 4th day of November, 1989, in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury, and the defendant being represented by counsel and having been found guilty of the crime of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (F); and

WHEREAS, thereafter, on the 16th day of May, 1990, the defendant being present in Court with his counsel MICHAEL GARDNER, Deputy Public Defender, and MELVYN T. HARMON, Chief Deputy District Attorney, also being present; the above entitled Court did adjudge Defendant guilty thereof by reason of said trial and verdicts and sentenced Defendant to the Nevada State Prison for LIFE WITH THE POSSIBILITY OF PAROLE (Second Degree Murder) plus a consecutive LIFE WITH THE POSSIBILITY OF PAROLE (Use of a Deadly

Weapon). Restitution $2,413.50. $20.00 Assessment Fee. Credit for Time Served 189 days.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 22 day of May, 1990, in the City of Las Vegas, County of Clark, State of Nevada.

DISTRICT JUDGE

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: 12-27-91
LORETTA BOWMAN, County Clerk and Clerk of the Eighth Judicial District Court, in and for the County and State aforesaid.
By Norma Aldred Deputy

89-92060X/kjh
NLVPD DR#89-12568
Second Degree Murder
w/wpn - F

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 21421

FILED
NOV 05 1991
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction of second-degree murder with the use of a deadly weapon. Having reviewed the record and briefs and having heard the parties' arguments, we conclude that Slack was properly convicted. On direct examination, Slack denied that he had a girlfriend/boyfriend relationship with the twelve-year-old victim. The prosecution's reference to a sexual relationship between Slack and the victim was not improper.

The prosecution, on cross-examination, asked Slack whether he had told the North Las Vegas Police Department that he had had sexual intercourse with the victim on Halloween, 1989. Slack did not remember making any such statement. Slack contends that this reference to an intimate relationship was improperly admitted because the jury was prejudiced by the thought of a nineteen-year-old man and a twelve-year-old girl having a sexual relationship.

We conclude that the prosecution's reference to the intimate relationship of Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. The

trial court has discretion over the limitations of cross-examination, Dyer v. State, 99 Nev. 422, 425, 663 P.2d 699, 701 (1983), and that discretion was not abused here.

Furthermore, any error in allowing this line of cross-examination was harmless, considering the amount of evidence linking Slack to the shooting. The fact that the jury returned a verdict of second-degree murder, when it was also instructed on first-degree murder, indicates that the disputed evidence was not prejudicial.

At oral argument, Slack's counsel conceded that the other issues raised in the brief were clearly without merit.

Accordingly, we hereby

ORDER this appeal dismissed.

Mowbray, C.J.

Springer, J.

Rose, J.

Steffen, J.

Young, J.

cc: Hon. Jack Lehman, Chief Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

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CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, Petitioner
(Full Name)

vs.

DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)

and

The Attorney General of the State of NEVADA, Additional Respondent.

(NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)

CV-N----91-561-H

CASE NO. _____
(To be supplied by the Clerk)

PETITION FOR A
WRIT OF HABEAS CORPUS
PURSUANT TO 28 U.S.C. §2254
BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

Yes /__/ No /XXX/

6) Nature of the offense involved: (all counts) _____

SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

a) Not Guilty /XXX/ b) Guilty /__/ c) Nolo Contendere /__/

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: _____

NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

a) A jury /XXX/ b) A judge without a jury /__/

10) Did you testify at trial (if any)? Yes /XXXX/ No /__/

11) Did you appeal from the judgment of conviction?

Yes /XXX/ No /__/

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV
PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: _____

DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal?

Yes /__/ No /XXX/ WASN'T NECESSARY

14) State **concisely** every ground on which you claim that you are being unlawfully held. Summarize **briefly** the **facts** supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO SEE PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXX / No ___/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ___/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes ___/ No ___/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes ___/ No ___/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes ___/ No ___/, N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSU

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER FOURTEENTH AMENDMENT AS FURTHER ARGUED IN THE DIRECT APPEAL, SEE ALSO DEFENDANT'S OPEN ING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX/ No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXX/

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS. LOUISIANA)

GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, SEE CAGE V. LOUISIANA, 111 S. CT. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTIO

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes XXXX No /__/

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes /__/ No XXXX

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition? Yes /__/ No /__/ NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes /__/ No /__/, N and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes /XXXXX No /__/

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes /__/ No /XXXXX If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack? Yes XXXX No ___/. If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction? Yes XXXXX No ___/. If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL= MICHAEL GARDNER DEPUTY CLARK COUNTY PU ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC § 3006A-a
Signature of Attorney (if any)

/Antonio T. Slack
Signature of Petitioner

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at ELY, NEVADA (Location) on NOVEMBER 12, (Date), 1991

/Antonio T. Slack
(Signature)

TONIC T. SLACK #31395
P. BOX 1989
ELY, NEV. 89301
PER-SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TONIC T. SLACK,
PETITIONER,

V.

RECTOR, NDOP, ET. AL.,
RESPONDENT /

CASE NO. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

PETITIONER, AN ELY STATE PRISONER APPEARING IN PER SE AND IN FORMA PAUPERIS REQUESTING APPOINTMENT OF COUNSEL.

GOOD CAUSE APPEARING.

IT IS THEREFORE, HEREBY ORDERED THAT COUNSEL IS APPOINTED FOR PETITIONER.

DATED THIS ___ DAY OF June, 1995

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
MAR - 4 1996
CLERK, U.S. DISTRICT COURT
BY RD DEPUTY

FILED
96 FEB 29 PM 3:40
LANCE S. WILSON
CLERK
BY RD
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,
Petitioner,
vs
DIRECTOR, NDOP, et al.,
Respondents

Case No. CV-N-95-194-DWH

ORDER

Respondents have filed a motion to dismiss the petition in this action (#15). Petitioner has failed to oppose the motion. Petitioner is hereby instructed to file points and authorities in opposition to the motion or respondents' motion will be granted. See Local Rule 110-2.

Petitioner has also moved for appointment of counsel (#8), which at this time will be denied.

IT IS THEREFORE ORDERED that Petitioner shall have twenty (20) days from the date of this order within which to file points and authorities in opposition to the motion. After petitioner's said response to the motion is filed, respondents shall thereafter have fifteen (10) days within which to file a reply. If petitioner fails to respond to this order, the motion will be deemed consented to and granted.

IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel (#8) is DENIED.

DATED this 29TH day of February, 1996.

UNITED STATES DISTRICT JUDGE

6) The ends of justice would best be served in this case if an attorney was appointed to represent the Petitioner.

Petitioner has contacted an attorney who is willing to accept an appointment to represent him in this matter. See: (Attached) copy of letter from Joan D. Buckley, Esq. Also see: (Attached) affidavit of Petitioner. Ms. Buckley not only has expressed an interest in being appointed to represent Petitioner in this matter, but also possesses some knowledge of the issues herein.

THEREFORE, Petitioner respectfully requests this Honorable Court to appoint Ms. Buckley to represent him herein, or to appoint the Federal Public Defenders' Office should the Court be hesitant to name Ms. Buckley. See: (Attached) PROPOSED ORDER.

Dated Feb 23 1996

Antonio T. Slack
Ely State Prison
P. O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF MAILING/SERVICE

I, Antonio T. Slack, hereby certify that on this date I served, by U.S. mail, a true and correct copy of this pleading with its attachments, to the following persons:

Frankie Sue Del Papa
Nevada Attorney General
Office of the Attorney General
Capitol Complex
Carson City, Nevada 89710

Joan D. Buckley, Esq. (Proposed Counsel)
302 E. Carson
Suite 508
Las Vegas, Nevada 89101

Dated Feb 23 1996

Antonio T. Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

RECEIVED
DEC 29 1997
Federal Public Defender
Las Vegas, Nevada

FILED
97 DEC 24 AM 11:14
LANCE S. WILSON
CLERK
BY

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Assistant Federal Public Defender
Attorney for Petitioner
330 South Third Street, Suite 700
Las Vegas, NV 89101

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,
vs.

E.K. McDaniel, Warden, Ely State Prison,

and

The Attorney General of the State of Nevada,
Respondents

CASE NO. CV-N-95-194-DWH

~~SECOND~~ THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)

Petitioner alleges as follows:

1. The challenged conviction was entered in the District Court for the Eighth Judicial District of Nevada, Las Vegas, Nevada, Hon. Earl White, presiding .

2. Judgment of conviction was entered May 16, 1990.

3. An appeal was filed with the Nevada Supreme Court; the appeal was decided November 5, 1991.

4. A petition for post-conviction relief was filed on July 10, 1992 in the Eighth Judicial District Court. The court denied the petition on September 2, 1992 and an appeal was taken: the appeal was decided on December 30, 1993.

5. One previous petition for relief was filed pursuant to 28 U.S.C. §2254 in Case No. CV-N-91-561-HDM. It was dismissed without prejudice on February 19, 1992.

6. No other pleadings or actions are pending in any other court.

7. Petitioner was convicted by jury trial of second degree murder with the use of a deadly weapon in Case No. C-89-92060. Petitioner received two consecutive sentences of life with the possibility of parole. Petitioner began serving his sentence on May 16, 1990.

8. Petitioner was represented by the following attorneys in state court:

Pre-trial and Trial: Deputy Public Defenders Victor Austin and Michael Gardner

Appeal: Deputy Public Defender Michael Gardner (brief); Deputy Public Defender Steve Dahl (oral argument).

Post-conviction Petition: Pro Se

Appeal from Denial of Post-conviction relief: Pro Se

FACTUAL SUMMARY

9. Petitioner was charged with killing Alanna Holmes on November 4, 1989. Ms. Holmes died as a result of a shotgun wound. Petitioner admitted, at trial to shooting Ms. Holmes with a shotgun but asserted that the shooting was accidental. Antonio Slack admitted that he shot and was responsible for the death of the decedent Alanna Holmes.

STATEMENT OF PRIOR PROCEEDINGS

10. The Judgment of Conviction-Case No. C89-92060

Petitioner challenges his conviction imposed in Criminal Case No. C89-92960 in the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. Slack pleaded not guilty and was convicted following a jury trial. Sentence was imposed for second degree murder with the use of a deadly weapon.. Slack was sentenced to the Nevada state prison for a term of life with the possibility of parole (second degree murder) and a consecutive term of life with the possibility of parole (use of a deadly weapon).

11. The Direct Appeal-Nevada Supreme Court Docket No. 21421

An appeal was taken to the Nevada Supreme Court raising the following issues:

Issue One: Whether insufficient evidence was adduced at trial to convict the defendant of second degree murder with use of a deadly weapon?

Issue Two: Whether the trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim?

Issue Three: Whether the reasonable doubt jury instruction given by the trial court violated the due process clause of the United States and Nevada constitution?

Issue Four: Whether the court erred by not adequately defining premeditation in the jury instructions regarding murder?

On September 11, 1991, Deputy Public Defender Steve Dahl argued petitioner's direct appeal before the Nevada Supreme Court. Mr. Dahl did not author the appellate brief. At oral argument, Mr. Dahl indicated that he would present argument only on Issue Two. On November 5, 1991, the Nevada Supreme Court issued an order dismissing the appeal.

12. State Petition for Writ of Habeas Corpus (Post Conviction) Slack v. State of Nevada, Case No.C-92960

On July 10, 1992, petitioner, in proper person, filed a Post Conviction Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. The petition raised the following grounds:

Ground One: Petitioner was denied his Sixth Amendment right to effective assistance of counsel pre-trial and at trial.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal.

Ground Three: The trial court violated petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial.

Ground Four: There was prosecutorial misconduct in petitioner's trial that prejudiced petitioner.

The petition for post conviction relief was denied in District Court, Clark County, Nevada on September 2, 1992. A formal order memorializing the court's decision was filed on February 11, 1993.

13. Appeal from order denying state Petition for Habeas Corpus (Post-Conviction) Slack v. State of Nevada, Case No. C-92060.

On December 30, 1993, the Nevada Supreme Court entered an Order dismissing the appeal from the denial of post conviction relief. Exhibit 3.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK,
Petitioner,
-vs-
DIRECTOR, NDOP, et al.,
Respondents.

Case No. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

U.S. DISTRICT COURT
DISTRICT OF NEVADA
ENTERED & SERVED
FEB 14 1997
CLERK, U.S. DISTRICT COURT
BY _____ DEPUTY

FILED
97 FEB 13 PM 12:42
LANCE S. WILSON
CLERK
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY T. SLACK,

Petitioner,

vs

DIRECTOR, NDOP, et al.,

Respondents.

Case No. CV-N-95-194-DWH

ORDER APPOINTING COUNSEL

The motion for leave to proceed in forma pauperis shows that petitioner lacks the resources necessary to employ counsel to prosecute this habeas corpus proceedings in which he attacks the validity of his conviction and sentence. It appears to be in the best interest of justice that counsel be appointed to represent petitioner herein. Therefore, petitioner named above being financially unable to employ counsel, and because the interests of justice so require, the Federal Public Defender for the District of Nevada shall be appointed to represent petitioner.

Counsel for petitioner shall contact petitioner within twenty (20) days and: (a) review the procedures applicable in cases under 28 U.S.C. § 2254; (b) discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case; and (c) advise petitioner that all possible grounds for habeas corpus relief should be raised at this time, and that the failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ.

IT IS THEREFORE **ORDERED** that petitioner's Motion for Appointment of Counsel is GRANTED to the extent that the Federal Public Defender for the District of Nevada is hereby appointed to represent petitioner in these proceedings. The Clerk of the Court shall send a copy of this order to the Federal Public Defender with a copy of the amended petition for writ of habeas corpus (#31).

IT IS FURTHER **ORDERED** that counsel for petitioner shall file an amended petition for writ of habeas corpus within forty-five (45) days or a notice to the court indicating his or her intent to proceed with the current amended petition (#31).

IT IS FURTHER **ORDERED** that respondents' Motion for Enlargement (#42) is DENIED as moot.

IT IS FURTHER **ORDERED** that petitioner's Motion for Judgment on the Pleadings (#38) is DENIED. Such a motion is inappropriate until the pleadings have closed.

Dated this 13th day of February, 1997.

UNITED STATES DISTRICT JUDGE

RECEIVED
DEC 29 1997
Federal Public Defender
Las Vegas, Nevada

FILED
97 DEC 24 PM 1:14
CLERK
BY

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Assistant Federal Public Defender
Attorney for Petitioner
330 South Third Street, Suite 700
Las Vegas, NV 89101

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK,

Petitioner,
vs.

E.K. McDaniel, Warden, Ely State Prison,

and

The Attorney General of the State of Nevada,
Respondents

CASE NO. CV-N-95-194-DWH

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